



Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation | December 16, 2020

1 As part of the rulemaking process, an agency creates a public rulemaking docket, which
2 consists of all rulemaking materials the agency has: (1) proactively published online or (2) made
3 available for public inspection in a reading room. Public rulemaking dockets include materials
4 agencies generate themselves and comments agencies receive from the public. Their purpose is
5 to provide the public with the information that informed the agency’s rulemaking.¹

6 The Administrative Conference has issued several recommendations to help agencies
7 balance the competing considerations of transparency and confidentiality in managing their
8 public rulemaking dockets.² This project builds on these recommendations.

9 The scope of the Recommendation is limited to personal information and confidential
10 commercial information that an agency has decided to withhold from its public rulemaking
11 docket, which this Recommendation calls “protected material.” The Recommendation specifies

¹ The public rulemaking docket is distinguished from “the administrative record for judicial review,” which is intended to provide courts with a record for evaluating challenges to the rule, and the “rulemaking record,” which means all comments and materials submitted to the agency during comment periods and any other materials the agency considered during the course of the rulemaking. *See* Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

² Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, advises agencies to allow submitters to flag confidential information, including trade secrets, and advises agencies to devise procedures for reviewing and handling such information. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Issues in e-Rulemaking*, ¶ 1, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, *supra* note 1, ¶ 11, advises agencies to develop guidance on managing and segregating protected information, such as confidential commercial information and sensitive personal information, while disclosing non-protected materials. *See also* Admin. Conf. of the U.S., Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,494 (Dec. 29, 1988); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

12 how agencies should consider handling protected material. For purposes of this
13 Recommendation, personal information is information that can be used to distinguish or trace an
14 individual’s identity, either alone or when combined with other information.³ Confidential
15 commercial information is commercial information that is customarily kept private, or at least
16 closely held, by the person or business providing it.⁴ Other types of information, such as national
17 security information and copyrighted materials, are beyond the Recommendation’s scope. The
18 Recommendation is also limited to addressing procedures for protecting materials that agencies
19 decide warrant protection. It is not intended to define the universe of protected materials.

20 Agencies accept public comments for their public rulemaking dockets primarily through
21 Regulations.gov, their own websites, and email. Regulations.gov and many agency websites that
22 accept comments expressly notify the public that agencies may publish the information
23 submitted in public comments.⁵ When a person submits a comment to an agency, however, the
24 agency typically does not immediately publish the comment. Instead, the agency generally takes
25 time to screen comments before publishing them. Most agencies perform at least some kind of
26 screening during this period.

27 For all agencies, whether to withhold or disclose protected material is governed by
28 various laws: some mandate disclosure, some mandate withholding, and some leave agencies
29 with substantial discretion in deciding whether to disclose. Although a full description of those
30 laws is beyond the scope of this Recommendation, a brief overview of at least some of this body
31 of law helps to identify the issues agencies face.

32 The Administrative Procedure Act requires agencies to “give interested persons an
33 opportunity to participate in rulemaking through submission of written data, views, or

³ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-130, MANAGING INFORMATION AS A STRATEGIC RESOURCE § 10 (37) (2016).

⁴ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

⁵ See Christopher Yoo, Protected Materials in Public Rulemaking Dockets 24 (Mar. 10, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-protected-materials-public-rulemaking-dockets>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

34 arguments.”⁶ The United States Court of Appeals for the D.C. Circuit has interpreted this
35 provision to ordinarily require that agencies make publicly available the critical information—
36 including studies, data, and methodologies—underlying proposed rules.⁷

37 The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed
38 above. Generally, the Privacy Act prevents agencies from disclosing any information about a
39 person, such as medical records, educational background, and employment history, contained in
40 an agency’s system of records, without that person’s written consent.⁸ The Trade Secrets Act
41 generally prevents agencies from disclosing trade secrets and other kinds of confidential
42 commercial information, such as corporate losses and profits.⁹

43 Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the
44 main exception relevant to this Recommendation is for information required to be released under
45 the Freedom of Information Act (FOIA).¹⁰ The Trade Secrets Act only has one exception, which
46 covers any materials authorized to be disclosed by statute (including FOIA) or regulation.¹¹
47 Whether a particular piece of personal or confidential commercial information meets one of the
48 exceptions often involves a complex determination that depends upon the exact type of
49 information at issue and its contemplated use, and agencies must determine the applicability of
50 the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of
51 confidential commercial information may turn in part on whether the agency in receipt of the
52 information assured the submitter that the information would be withheld from the public.¹² If an

⁶ 5 U.S.C. § 553(c).

⁷ See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). In addition to these public transparency requirements, there are a number of federal record-retention requirements of which agencies should be aware. See, e.g., 44 U.S.C. § 3301.

⁸ 5 U.S.C. § 552a(b).

⁹ 18 U.S.C. § 1905.

¹⁰ 5 U.S.C. § 552a(b)(2).

¹¹ See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).

¹² See *Food Mktg. Inst.*, 139 S. Ct. at 2361.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

53 agency offers assurances that it will not disclose confidential commercial information, the
54 agency and the submitter may rely on those assurances as a defense against compelled disclosure
55 under FOIA. In many cases, agencies assure companies that they will not disclose such
56 information in order to encourage companies to submit it.

57 Particular cases are governed by specific requirements of law, not broad categorical
58 labels. But generally, agencies often consider certain types of personal information and
59 confidential commercial information to be protected material (e.g., trade secrets, social security
60 numbers, bank account numbers, passport numbers, addresses, email addresses, medical
61 information, and information concerning a person's finances).

62 There are many ways such protected material may arrive at the agency in a rulemaking. A
63 person might submit his or her own information, intentionally or unintentionally, and then ask
64 the agency not to disclose it. A third party might submit another person's information, with or
65 without that person's knowledge. A company might submit a document containing its own
66 confidential commercial information, intentionally or unintentionally, with or without the
67 agency's prior assurance of protection. Or a company might submit another company's or
68 person's information. Depending on the information in question, and the manner in which it was
69 submitted, there may be issues of waiver of statutory protection. Such questions, like all
70 questions regarding the substance of the laws governing protected material, are beyond this
71 Recommendation's scope, but they illustrate the various considerations that agencies and the
72 public often face in the submission and handling of such material.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

73 This Recommendation proposes steps agencies can take to withhold protected materials
74 from their public rulemaking dockets while still providing the public with the information upon
75 which agencies relied in formulating a proposed rule.¹³

RECOMMENDATION

Recommendations for All Agencies

- 76 1. For purposes of this Recommendation, “protected material” is personal information or
77 confidential commercial information that agencies determine should be withheld from the
78 public rulemaking docket. “Personal information” is information that can be used to
79 distinguish or trace an individual’s identity, either alone or when combined with other
80 information. “Confidential commercial information” is commercial information that is
81 customarily kept private, or at least closely held, by the person or business providing it.
82 To reduce the risk that agencies will inadvertently disclose protected material, agencies
83 should describe what kinds of personal and confidential commercial information qualify
84 as protected material and should clearly notify the public about their treatment of
85 protected material. An agency’s notifications should:
- 86 a. Inform members of the public that comments are generally subject to public
87 disclosure, except when disclosure is limited by law;
 - 88 b. Inform members of the public whether the agency offers assurances of protection
89 from disclosure for their confidential commercial information and, if so, how to
90 identify such information for the agency;
 - 91 c. Instruct members of the public never to submit protected material that pertains to
92 third parties;

¹³ Permitting the submission of anonymous and pseudonymous comments is one way that some agencies attempt to reduce the privacy risks that commenters face when submitting protected material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in an ongoing project of the Administrative Conference titled *Mass, Computer-Generated, and Fraudulent Comments* and are beyond the scope of this Recommendation.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 93 d. Advise members of the public to review their comments for the material identified
94 above in (c) and, if they find such material, to remove it;
- 95 e. Inform members of the public that they may request, during the period between
96 when a comment is received and when it is made public, that protected material
97 they inadvertently submitted be withheld from the public rulemaking docket;
- 98 f. Inform members of the public that they may request, after the agency has
99 published any comment, that protected material pertaining to themselves or to
100 their dependents within the comment be removed from the public rulemaking
101 docket; and
- 102 g. Inform members of the public that the agency reserves the right to redact or
103 aggregate any part of a comment if the agency determines that it constitutes
104 protected material, or may withhold a comment in its entirety if it determines that
105 redaction or aggregation would insufficiently prevent the disclosure of this
106 material.
- 107 2. An agency should include the notifications described in Paragraph 1, or a link to those
108 notifications, in at least the following places:
- 109 a. Within the rulemaking document on which the agency requests comments, such
110 as a notice of proposed rulemaking or an advance notice of proposed rulemaking;
- 111 b. On the agency's own comment submission form, if the agency has one;
- 112 c. Within any automatic emails that an agency sends acknowledging receipt of a
113 comment;
- 114 d. On any part of the agency's website that describes its rulemaking process; and
- 115 e. Within any notices of public meetings pertaining to the rule.
- 116 3. The General Services Administration's eRulemaking Program Management Office
117 should work with agencies that participate in Regulations.gov to include or refer to the



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 118 notifications described in Paragraph 1 within any automated emails Regulations.gov
119 sends acknowledging receipt of a comment.
- 120 4. If a submitter notifies an agency that the submitter inadvertently included protected
121 material in the submitter's comment, the agency should act as promptly as possible to
122 determine whether such material warrants withholding from the public rulemaking docket
123 and, if so, withhold it from the public rulemaking docket, or, if already disclosed, remove
124 it from the public rulemaking docket.
- 125 5. Agencies should allow third parties to request that protected material pertaining to
126 themselves or a dependent be removed from the public rulemaking docket. Agencies
127 should review such requests and, upon determining that the material subject to the request
128 qualifies as protected material, should remove it from the public rulemaking docket as
129 promptly as possible.

Recommendations for Agencies That Screen Comments for Protected Material Before Publication in the Public Rulemaking Docket

- 130 6. Agencies that screen comments for protected material before publication in the public
131 rulemaking docket, either as required by law or as a matter of discretion, should redact
132 the protected material and publish the rest of the comment. Redaction should be thorough
133 enough to prevent the public from discerning the redacted material, but not so broad as to
134 prevent the public from viewing non-protected material.
- 135 7. If redaction is not feasible within a comment, agencies should consider presenting the
136 data in a summarized form.
- 137 8. If redaction is not feasible across multiple, similar comments, agencies should consider
138 presenting any related information in an aggregated form. Agencies should work with
139 data science experts and others in relevant disciplines to ensure that aggregation is
140 thorough enough to prevent someone from disaggregating the information.
- 141 9. If the approaches identified in Paragraphs 6–8 would still permit a member of the public
142 to identify protected material, agencies should withhold the comment in its entirety.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 143 When doing so, they should describe the withheld material for the public in as much
144 detail as possible without compromising its confidentiality.
- 145 10. When deciding whether and how to redact, aggregate, or withhold protected material,
146 agencies should explore using artificial intelligence-based tools to aid in identifying
147 protected material. Agencies should speak with private sector experts and technology-
148 focused agencies, such as the General Services Administration’s Technology
149 Transformation Service and the Office of Management and Budget’s United States
150 Digital Service, to determine which tools are most appropriate and how they can best be
151 deployed given the agencies’ resources.

Recommendations for Agencies That Offer Assurances of Protection from Disclosure of Confidential Commercial Information

- 152 11. Agencies that offer assurances of protection from disclosure of confidential commercial
153 information should decide how they will offer such assurances. Agencies can choose to
154 inform submitters, directly upon submission, that they will withhold confidential
155 commercial information from the public rulemaking docket; post a general notice
156 informing submitters that confidential commercial information will be withheld from the
157 public rulemaking docket; or both.
- 158 12. Such agencies should adopt policies to help them identify such information. Agencies
159 should consider including the following, either in tandem or as alternatives, as part of
160 their policies:
- 161 a. Instructing submitters to clearly identify that the document contains confidential
162 commercial information;
 - 163 b. Instructing submitters to flag the particular text within the document that
164 constitutes confidential commercial information; and
 - 165 c. Instructing submitters to submit both redacted and unredacted versions of a
166 comment that contains confidential commercial information.